In the Supreme Court of the United States.

OCTOBER TERM, 1903.

SPRECKELS SUGAR REFINING COMPANY, plaintiff in error,
v.
PENROSE A. MCCLAIN, COLLECTOR OF internal revenue for the first district of Pennsylvania.
} No. 103.

BRIEF IN REPLY ON QUESTION OF JURISDICTION.

In view of the discussion at the bar elicited by the questions of the court with reference to its jurisdiction of the case, the Government deems it appropriate to submit some further observations thereon.

I.

Whether the views suggested in the Government brief are correct or not, it would seem that this court has no jurisdiction of the case, and that the writ of error must be dismissed.

If, as heretofore contended, the circuit court of appeals *had* jurisdiction, the case having arisen under the revenue laws, the plaintiff in error having chosen that procedure, but that court having

passed upon the entire case, without certifying the constitutional question, and no petition for a writ of certiorari having been submitted, more than a year having elapsed, it follows that, for the reasons already stated, the case is not properly here, and a dismissal must follow.

II.

If, on the other hand, as suggested in the discussion at the bar, the circuit court of appeals did *not* have jurisdiction, the Government contends that the present writ of error must nevertheless be dismissed. It appears from the transcript of the record (pp. 3–6) that the suit was one which did "really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution" (*American Sugar Refining Co.* v. *New Orleans*, 181 U. S., 281), for in the "Statement of the Plaintiff's Demand" it is claimed:

First. "That the said law, in so far as it assumes to subject corporations or companies carrying on or doing business of refining sugar to pay a special excise tax, is unconstitutional and void."

Second. "That the said tax is a direct tax which has not been apportioned among the several States as required by the Constitution of the United States, and is not uniform throughout the United States, and is invalid."

The suit was brought by the Spreckels Sugar Refining Company, "a corporation organized and

existing under and by virtue of the laws of the State of Pennsylvania, engaged in the business of manufacturing sugar; and the defendant was, at the various times hereinafter mentioned, the collector of internal revenue for the first district of Pennsylvania." (Rec., pp. 2, 5.) The jurisdiction of the circuit court of the United States over the case, therefore, rested solely on the ground that the suit arose under the Constitution and laws of the United States. (Act of August 13, 1888, 25 Stats., 434.) It was a claim for the refund of taxes assessed and collected under a statute of the United States, which statute it was asserted was unconstitutional and void. As the constitutional question appeared on the face of the first pleading in the case, the appellate jurisdiction of this court under section 5 of the act of March 3, 1891, establishing circuit courts of appeals, was exclusive.

In the case of *American Sugar Refining Co.* v. *New Orleans* (*supra*), the Chief Justice, referring to the circuit court of appeals act, said:

> The intention of the act in general was that the appellate jurisdiction should be distributed, and that there should not be two appeals, but in cases where the decisions of the courts of appeals are not made final, it is provided that "there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy exceeds one thousand dollars besides costs."

> And the right to two appeals would exist in *every case* (the litigated matter having the requisite value) where the jurisdiction of the circuit court rested solely on the ground that the suit arose under the Constitution, laws, or treaties of the United States, if such cases could be carried to the circuit court of appeals, for their decisions would not come within the category of those made final.
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> As, however, a case so arises where it appears on the record, from plaintiff's own statement, in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution, or some law or treaty of the United States (*Gold Washing and Water Co.* v. *Keyes*, 96 U. S., 199; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S., 571; *Western Union Telegraph Co.* v. *Ann Arbor Railroad Company*, 178 U. S., 239) and as those cases fall strictly within the terms of section five, the *appellate jurisdiction of this court in respect of them is exclusive.*

Also, in the case of the *Huguley Mfg. Co.* v. *Galeton Cotton Mills* (184 U. S., 290, 295), the Chief Justice, speaking for the court, said:

> If the jurisdiction of the circuit court rests solely on the ground that the suit arises under the Constitution, laws, or treaties of the United States, then the jurisdiction of this court is exclusive.

The writ of error here having been sued out to review not the judgment of the circuit court, but the judgment of the circuit court of appeals, it follows that this court has no jurisdiction and the writ must be dismissed. To give this court jurisdiction the writ of error should have been sued out under section 5 of the circuit court of appeals act direct from this court to review the judgment of the circuit court.

In the case of *Cary Manufacturing Co.* v. *Acme Flexible Clasp Co.* (187 U. S., 428) the Chief Justice, speaking for the court, said:

> It is settled that even if a party might be entitled to come directly to this court under that section [5], yet if he does not do so, and carries his case to the circuit court of appeals, he must abide by the judgment of that court.

III.

Opposing counsel admits that if the case is one arising solely under the revenue laws, the writ of error can not be sustained; but he also contends that the jurisdiction of the circuit court was invoked (1) because of a constitutional question, and (2) because of a question arising under the revenue laws. Because the case involved a question arising under the revenue laws, it appears to be contended that there was a right, under section 6 of the act of March 3, 1891, to a review by the circuit court of appeals; and that because the jurisdiction of the circuit court rested also upon a

constitutional question, that that question, although arising in a revenue case, was not final in the circuit court of appeals, but is reviewable here. It would follow, therefore, that in "all cases arising under * * * the revenue laws," which involved constitutional questions, Congress provided two methods and two forums for a review of such cases. Either such a case might be taken direct to the Supreme Court from the circuit court, under section 5, or to the circuit court of appeals, under section 6, with a further right of appeal to this court. But, as heretofore shown, this court has held in *American Sugar Refining Co.* v. *New Orleans* (181 U. S., 281) and *Huguley Manufacturing Co.* v. *Galeton Cotton Mills* (184 U. S., 290, 295) that the appellate jurisdiction of this court is exclusive when the constitutional question appears from the plaintiff's own statement, as it does in this case. As is shown in the former case, the right to two appeals (clearly not tenable) would exist in every case "where the jurisdiction of the circuit court rested solely on the ground that the suit arose under the Constitution, laws, or treaties of the United States, if such cases could be carried to the circuit court of appeals."

It is submitted that there are no separate grounds of jurisdiction in the present case, because of a constitutional question, and of a question arising under a revenue law, but that the case is one which clearly arose solely under the "Constitution or

laws of the United States." (Act of August 13, 1888, 25 Stat., 434.)

IV.

It was suggested at the hearing that even if the circuit court of appeals had jurisdiction to review a case involving a constitutional question fairly raised in the initial pleading, which case, because of the constitutional question involved, would be subject to review by this court, nevertheless the judgment in the present case is not such a final judgment as may be reviewed here. The circuit court of appeals on the writ of error from that court reversed the judgment of the circuit court "solely upon the ground that the circuit court erred in holding that the plaintiff was required to pay the tax in question otherwise than annually." The circuit court of appeals therefore reversed and remanded the case "to the said circuit court for further proceedings in conformity with the opinion of this [that] court." The judgment of the circuit court of appeals is not final in form, but requires something further to be done by the circuit court.

The claim of the plaintiff in error, *inter alia*, was for interest upon the several amounts paid by him to the collector of internal revenue monthly between October 11, 1898, and March 23, 1900. (Rec., p. 4.) The circuit court held that the payments were properly made monthly, and entered judgment on the special verdict for the amount of

tax paid on business done before the passage of the act, and for stevedoring, "with the proper interest on both sums," amounting to $1,056.82. The case was remanded, therefore, to the circuit court in order that the amount of interest due under the judgment of the circuit court, modified in accordance with the opinion of the circuit court of appeals, might be ascertained.

In the case of *Keystone Iron Co.* v. *Martin* (132 U. S., 91, 93), the rule is laid down that a decree to be final must "dispose of the entire controversy between the parties," and the principal cases are collected in which decrees were held not appealable, because not final.

In the case of *Bostwick* v. *Brinkerhoff* (106 U. S., 3), Mr. Chief Justice Waite stated the principle as follows:

> The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.

It is obvious that the circuit court in the present case could not execute the judgment already ren-

dered by it should the judgment of the circuit court of appeals be affirmed by this court. It is submitted, therefore, that the judgment was not final, and for that reason not reviewable here, and that the writ of error should be dismissed.

HENRY M. HOYT,
Solicitor-General.

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